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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
Requests for Emergency Temporary Relief Enjoining AT&T Corp. from Discontinuing Service Pending Final Decision	)	CC Docket No. 96-262

COMMENTS OF TIME WARNER TELECOM INC IN SUPPORT OF REQUESTS FOR EMERGENCY RELIEF

Time Warner Telecom Inc. (Time Warner Telecom), by its attorneys, hereby submits its comments in support of the requests for emergency relief filed in this proceeding, and states as follows:

On February 18, 2000, the Rural Independent Competitive Alliance (RICA) – a consortium of competitive local exchange carriers (CLECs) serving rural communities – and several of its members filed a request for emergency relief asking the Commission to enjoin AT&T Corp. from carrying through on its stated threats to withdraw interexchange telecommunications service from consumers who also receive their local exchange service from those CLECs.[1] On May 5, 2000, a similar request for emergency relief was filed by the

[1] CLEC members of RICA include CTC Telecom, Consolidated Communications Networks, Inc., Forest City Telecom, Inc., Heart of Iowa Communications, Inc., Mark Twain Communications Company, and XIT Telecommunications & Technology, Inc.

Minnesota CLEC Consortium (Minn. Consortium) on behalf of its members.[2] By public notice issued May 15, 2000, the Commission invited public comment on these requests for emergency relief.[3]

Time Warner Telecom is a CLEC. Unlike those CLECs who are members of RICA and the Minn. Coalition, Time Warner Telecom does not serve primarily rural communities. It provides competitive local exchange service and exchange access service in twenty-one metropolitan areas in eleven states. Like the members of RICA and the Minn. Coalition, Time Warner Telecom provides originating and terminating exchange access services for those interexchange carriers which provide interexchange services to Time Warner Telecom's local exchange service customers. Thus, it is in a comparable position to the RICA and Minn. Coalition companies and shares those companies' concerns about threats of any interexchange carriers to discontinue providing service to customers based on those customers' choice of local service provider.

The RICA and Minn. Coalition requests describe written threats by AT&T Corp. to withdraw its interexchange services from consumers who happen to obtain their local exchange services from CLECs rather than from the incumbent local exchange carriers (ILECs) who serve the same geographic areas as those CLECs. Underlying those threats to refuse to provide

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[2] Members of the Minn. Consortium include Ace Telephone Association, HomeTown Solutions, LLC, Hutchinson Telecommunications, Inc., Integra Telecom of Minnesota, Inc., Local Access Network LLC, Mainstreet Communications, LLC, NorthStar Access, LLC, Otter Tail Telcom LLC, Paul Bunyan Rural Telephone Cooperative, Tekstar Communications Systems, Inc., U.S. Link, Inc., VAL-ED Joint Venture, LLP, and WETEC, LLC.

[3] Public Notice - Common Carrier Bureau Seeks Comment on the Requests for Emergency Temporary Relief of the Minnesota CLEC Consortium and the Rural Independent Competitive Alliance Enjoining AT&T Corp. from Discontinuing Service Pending Final Decision, DA 00-1067, released May 15, 2000.

interexchange service to consumers who want that service, who are willing to pay carriers' tariffed charges for their services, and who use the service in conformance with all applicable regulations and conditions governing use of that service, is AT&T's unhappiness over the switched access rates assessed on it by those CLECs. Interexchange carriers who purchase access service, like all consumers of interstate telecommunications services, have the right to object to charges for those services. Indeed, the Communications Act and the Commission's rules contain mechanisms for challenging the lawfulness of charges for service. Consumers may petition the Commission to reject or to suspend and investigate tariffs.[4] More importantly, pursuant to Section 208 of the Act, aggrieved consumers may complain to the Commission if they believe that they are being charged unlawful rates. Nothing in the Act nor in the Commission's rules empowers telecommunications common carriers to avoid their statutory common carrier obligations to selected consumers based on the identity of the entity providing switched access service to those consumers.

Time Warner Telecom agrees with RICA and the Minn. Coalition that an interexchange carrier's threatened withdrawal of service from certain consumers would violate not less than six provisions of the Communications Act. Those sections include Section 201(a), Section 201(b), Section 202(a), Section 203(c), Section 214(a), and Section 251(a). Each of those sections' relevance to the threat of interexchange carriers to deny service to customers based solely on those customers' choice of local service provider will be briefly addressed in these comments. However, Time Warner Telecom recognizes that the legal issues raised by the RICA and Minn.

[4] See Section 1.773 of the Commission's Rules, 47 C.F.R. § 1.773.

Coalition requests are before the Commission in its Access Reform Proceeding.[5] Time Warner Telecom already has addressed the lawfulness of such interexchange carrier "self-help" conduct in that proceeding.[6] However, the threatened disruption of consumer service described in the RICA and Minn. Coalition requests made during the pendency of the Access Charge Reform proceeding compels the Commission to take such action as necessary and appropriate to ensure that consumers are not unlawfully denied service and to ensure that no interexchange carrier be permitted to "strong arm" customers or CLECs during the interim. Because the legal questions underlying such threats are so profound Time Warner Telecom concurs with RICA and the Minn. Coalition that a clear directive prohibiting disruption of interexchange service to any consumer based upon the consumer's choice of local service provider should be issued forthwith so as to avoid prejudging the outcome of important issues before the Commission in the Access Reform proceeding.

Section 201(a). Section 201(a) requires "every common carrier engaged in interstate or foreign communication by wire or radio to furnish such service upon reasonable request therefor." The Commission historically has construed the "reasonable request" standard of Section 201(a) broadly and has required carriers to provide service even when in litigation with a customer over the reasonableness of a service request. Hawaiian Telephone Co., 78 FCC2d 1062 (1980). It strains credulity for any IXC to disregard the reasonableness of a consumer's service request based solely on the fact that the consumer has chosen a local service provider whose

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[5] Access Charge Reform, *et al* (*Fifth Report and Order and Notice of Proposed Rulemaking*), FCC 99-206, released August 27, 1999.

[6] Comments of Time Warner Telecom filed October 29, 1999 and Reply Comments of Time Warner Telecom filed November 29, 1999.

tariffed rates for switched access exceed what the IXC would like to pay. The Section 201(a) obligation of common carriers to provide service on request is not an absolute obligation. It is expressly limited to "reasonable" requests. For example, the Commission has limited such requests to those which are technically feasible.[7] Neither does the Section 201(a) obligation require a carrier to obtain sufficient capacity to meet "extraordinary" demands for service.[8] However, providing service to customers of CLECs does not require any upgrading or changing of an interexchange carrier's facilities nor does it necessitate obtaining additional capacity. Thus, there is nothing unreasonable about customers of CLECs requesting service from interexchange carriers and a denial of such reasonable requests would be violative of the service obligation codified at Section 201(a).

Section 201(b). Section 201(b) declares to be unlawful all charges, practices, classifications and regulations that are not just and reasonable. In a recent decision, the Commission held that a similar means used by an interexchange carrier to avoid payment of applicable tariffed access charges imposed by a CLEC constituted an unjust and unreasonable practice in violation of Section 201(b). In MGC Communications, Inc. v. AT&T Corp., 14 FCC Rcd 11647 (Com. Car. Bur. 1999), *aff'd*, 1999 FCC LEXIS 6601 (1999), the Commission held that AT&T's acceptance and utilization of a CLEC's access service combined with its refusal to pay the CLEC's tariffed rates for that service was an unjust and unreasonable practice in violation of Section 201(b). The Commission quite accurately described this unlawful conduct

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[7] See, *e.g.*, Allnet Communication Services, Inc. v. Pub. Serv. Tel. Co., 11 FCC Rcd 12766 (1996).

[8] See, *e.g.*, Investigation of Access and Divestiture Related Tariffs, 97 FCC2d 1082 (1984), Cable News Network, Inc. v. RCA American Communications, Inc., 78 FCC2d 1200 (1980).

as "self-help." Refusal to provide service to customers of specific CLECs is a similar, but no less insidious form of "self-help" and should be enjoined by the Commission as requested by RICA and the Minn. Coalition.

Section 202(a). Section 202(a) of the Act proscribes common carriers from engaging in unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities or services. It is difficult to imagine a more blatant example of a facially unreasonable discrimination than for a carrier to provide service to some requesting consumers while refusing to provide the same service to other consumers who are comparable in all respects, except for the identity of their local exchange service provider. In determining whether disparate treatment of like services rises to the level of being unjustly and unreasonably discriminatory in violation of Section202(a), the Commission has applied a functional equivalency test.[9] Applying that test to the instant situation – differing availability of interexchange services to different classes of customers based solely on the local service provider selected by each customer class – there is no difference in the service sought by each customer class. Toll service provided to customers of ILECs is not materially different than toll service provided to customers of CLECs. The Commission has long held that provision of service to certain customer groups while denial of the same service to otherwise identical customer groups violates Section 202(a).[10] Application of the Commission's traditional Section 202(a) analysis compels a conclusion that making service available to customers of ILECs while denying the same service to otherwise similarly situated customers of CLECs constitutes unreasonable discrimination under Section 202(a).

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[9] AT&T Communications Revisions to Tariff FCC No. 12, 6 FCC Rcd 7039 (1991), *aff'd* Competitive Telecommunications Association v. FCC, 998 F.2d 1058 (D.C. Cir. 1993).

[10] Keliipio v. The Tel. Co., Inc. 54 FCC2d 549 (1975).

Section 203(c)[11]. Section 203(c)(3) provides that "no carrier shall extend to any person any privileges or facilities, in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges except as specified in such schedule." Time Warner Telecom is not aware of any of its access customers (*i.e.*, the interexchange carriers to whom it provides access service) including in their filed tariffs provisions which limit availability of service to consumers depending on those consumers' choice of local exchange service provider. Yet, that is precisely the conduct described in the RICA and Minn. Coalition requests. If an interexchange carrier were to revise its tariff so as to limit the availability of its services to customers of certain LECs, it is doubtful either that such provisions could be enforced or that they would be found by the Commission to be lawful.[12]

Section 214. Section 214(a) provides, in part, that "[n]o carrier shall discontinue, reduce or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby." (emphasis added). Clearly discontinuance of interexchange service to customers of CLECs would constitute an

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[11] Time Warner Telecom recognizes that as a result of a recent court of appeals decision in MCI WorldCom v. FCC, No. 96-1459 (D.C. Cir. April 28, 2000), interexchange carriers must withdraw their domestic interstate tariffs by January 31, 2001. See Public Notice - Domestic, Interexchange Carrier Detariffing Order Takes Effect, Common Carrier Bureau Implements Nine-Month Transition Period, DA 00-1028, released May 9, 2000. After mandatory detariffing is implemented, Section 203 may no longer be applicable to the domestic services of interexchange carriers. Of course, the other statutory provisions affecting interexchange services will remain applicable.

[12] In its Request, the Minn. Coalition asserts that withdrawal of interexchange service from consumers who are also CLEC customers violates Section 203(b). That section forbids changes or limitations in the availability of tariffed service without the required public notice of the changes. Time Warner Telecom concurs with that conclusion.

unauthorized discontinuance of service to a "part of a community" within the statutory proscription of Section 214. "Community" for purposes of Section 214 is not limited to geographical entities.[13] Thus, before an access customer could discontinue service to those of its customers served by CLECs, the access customer would have to submit to the Commission an application for discontinuance authority pursuant to Section 214(a). In determining whether to grant such a discontinuance application, the Commission would weigh the benefits to a particular community of continued service against the burden that would be imposed on the filing carrier if it were to remain required to provide service to that community or part of a community.[14] Whether or not the Commission would or should grant such a discontinuance application would depend on numerous circumstances, including whether the customers affected would be able to receive service from other sources. How the Commission might treat such applications for discontinuance is problematic. So far as Time Warner Telecom is aware, no applications for Section 214 authority to discontinue service to the "part of [any] community" served by CLECs have been filed by any interexchange carriers."

Section 251(a). Section 251(a) provides that each telecommunications carrier has the duty (1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers. While Section 251 of the Act – added to the Communications Act by the Telecommunications Act of 1996 – often is regarded as an important component of the

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[13] ITT World Communications, Inc. v. New York Telephone Co., 381 F. Supp. 113 (S.D.N.Y. 1974). See also Chastain, *et al* v. AT&T, 43 FCC2d 1079 (1973), *recon. den.* 49 FCC2d 749 (1974) (discontinuance of service of portable mobile telephone customers within having first obtained Section 214 authorization violated the Act).

[14] Southwestern Bell Telephone Company, *et al*, Applications for Authority Pursuant to Section 214 of the Communications Act of 1934 to Cease Providing Dark Fiber Service, 8 FCC Rcd 2589 (1993).

statutory scheme mandating local telecommunications competition, in actuality, the scope of Section 251 is broader. Unlike the obligations imposed on local exchange carriers by Section 251(b) and the special obligations imposed on incumbent LECs by Section 251(c), the obligations of Section 251(a) including the aforementioned duty to interconnect with other carriers, is expressly applicable to all telecommunications carriers, including those interexchange carriers who have threatened not to interconnect with the facilities or equipment of certain CLECs. To allow any carrier to refuse to connect with other carriers would frustrate the important goals of consumer choice, competition and open and interconnected networks which underlie the 1996 Telecommunications Act.

CONCLUSION

For all of the foregoing reasons as well as those set forth by Time Warner Telecom in its comments on the Fifth Report and Order and Notice of Proposed Rulemaking in the Access Charge Reform proceeding, Time Warner Telecom respectfully urges the Commission to enjoin any interexchange carrier from refusing to provide service to consumers who obtain local telecommunications services from CLECs pending resolution of the issues in CC Docket No. 96-262 regarding CLEC access charges.

Respectfully Submitted,

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June 14, 2000

CERTIFICATE OF SERVICE

I, Melodie Kate, a secretary in the law firm of Greenberg Traurig, certify that I have this 1st day of May 2000, caused to be sent by first-class mail, a copy of the foregoing COMMENTS IN SUPPORT OF REQUESTS FOR EMERGENCY RELIEF to the following:

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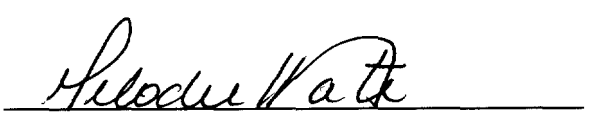

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